87-1144

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

In Re MERRELL G. VANNIER,

Petitioner,

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTION PRESENTED

Whether a state may, consistently with the requirements of the due process clause of the Fourteenth Amendment, disbar an attorney summarily without any hearing on the basis of a sister state's adjudication of professional misconduct and disbarment when the attorney has raised claims of mitigating circumstances and rehabilitation which, if valid, would have a material bearing under state law on the issue of whether disbarment is appropriate, and/or when the attorney has raised a claim that the sister state's adjudication was constitutionally deficient and unfairly reached because he was not afforded the opportunity to confront and cross-examine the witnesses against him.

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The petitioner, Merrell G. Vannier, respectfully prays that a writ of certiorari issue to review the judgment and order of the Supreme Court of Missouri entered in this proceeding on September 15, 1987.

OPINIONS BELOW

The order of the Supreme Court of Missouri, which is not reported, appears in the Appendix attached hereto.

JURISDICTIONAL STATEMENT

The order of the Supreme Court of Missouri was entered on September 15, 1987, and this petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

"No State shall enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner was admitted to the practice of law in Missouri in September, 1975 and in Florida in July, 1976. On November 26, 1986, as a result of misconduct which occurred ten years previously in 1976, he was disbarred by order of the Supreme Court of Florida over the dissent of two justices who would have suspended him from practice for 90 days because of several mitigating factors: his youth at the time of the misconduct, the passage of ten years with no subsequent ethical

problems, and the facts that his misconduct did not injure any party and did not violate any law. See The Florida Bar v. Vannier, 498 So.2d 896 (1986).[1]

On June 25, 1987, the Supreme Court of Missouri issued an order to show cause to petitioner pursuant to Missouri Supreme Court Rule 5.19, which is entitled "Reciprocal Discipline for Misconduct" and which reads:

> "Upon receipt of information that an attorney admitted to practice in Missouri has been adjudged guilty of professional misconduct in another jurisdiction, this Court shall cause to be served on said attorney an order to show cause why said adjudication should not be conclusive of said misconduct for the purpose of discipline by this Court."

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[1] The Florida charges were not brought until April 1980 and were not tried until 1985 due, in part, to the fact that petitioner had voluntarily refrained from practicing law there or in any other state while the charges were pending.

Mr. Vannier, who then resided in California, filed in pro se papers in response to the order to show cause in which he argued that Missouri case law required Missouri to make an independent determination as to whether misconduct adjudged in a sister state warranted discipline in Missouri and, if so, the extent of the discipline. He claimed that the penalty of disbarment in Missouri was inappropriate because of various mitigating factors: the conduct leading to the Florida disbarment occurred between May 1976, and May, 1977; he was at the time only one year out of law school; he had not harmed his clients, as the Florida Bar had conceded; he had not violated any statutory law; he had an unblemished record since the events at issue; he had been born, raised and educated in Missouri and had prac-

ticed law in Missouri since the events at issue (in 1978 and 1979) without disciplinary problems; he was of current good moral character; there was no basis to find that he would likely engage in future misconduct; and he was fit to continue to practice law in Missouri.

Petitioner also argued in his papers responding to the order to show cause that due process of law prohibited Missouri from adopting the Florida findings of misconduct because, inter alia, those findings were based on the admission of massive undifferentiated hearsay evidence which had deprived him of his fundamental rights to confront and cross-examine the witnesses against him, and that he was in fact not guilty of the misconduct charged against him. He noted that the Florida Supreme Court had rejected his due process arguments with the observation that

"[i]n Bar disciplinary cases, hearsay is admissible and there is no right to confront witnesses face to face." See 498 So.2d at 898.

Accordingly, invoking his rights to procedural due process of law, he asked the Missouri Supreme Court to afford him a fair and proper hearing on the issues raised in his papers. However, on September 15, 1987, the Missouri Court ruled that petitioner had "failed to show just cause why the adjudication of the Supreme Court of Florida should not be conclusive of the misconduct found by that Court for the purpose of discipline by this Court," and summarily issued an order disbarring him.

REASONS FOR GRANTING THE WRIT

I

THE ORDER BELOW PRESENTS IMPORTANT, UNDECIDED AND RECURRING QUESTIONS SURROUNDING THE PROCEDURAL DUE PROCESS RIGHTS OF ATTORNEYS IN DISCIPLINARY PROCEEDINGS BROUGHT IN ONE STATE ON THE BASIS OF MISCONDUCT ADJUDICATED IN SISTER STATE PROCEEDINGS.

The practice of law, of course, increasingly transcends state boundaries, and the resulting increase in the number of attorneys admitted to practice in more than one state inevitably has resulted in a drastic increase in disciplinary proceedings brought in one state on the basis of sister state adjudications of professional misconduct. The extent to which procedural due process must be afforded an attorney in such a proceeding--or, put another way, whether one

state may summarily discipline an attorney on the basis of a sister state's adjudication--is thus a recurring question of profound importance to the integrity of the legal profession and thus to the administration of justice generally.

The Missouri Supreme Court summarily disbarred petitioner on the basis of the Florida Supreme Court's adjudication without affording him a hearing on his claims that the adjudged misconduct did not warrant disbarment in view of several mitigating circumstances and that the Florida findings were the product of constitutionally defective proceedings. There can be no question since In re Ruffalo, 390 U.S. 543.550 (1968), that

> "[d]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer,"

and that

> "[h]e is accordingly entitled to procedural due process of law, which includes fair notice of the charge" and "opportunity . . . for explanation and defense."

The process which is due certainly includes the right to an evidentiary hearing replete with the opportunity to confront and cross-examine witnesses providing evidence supporting the charge, to present evidence in one's own favor and to argue one's cause in person. See, e.g., Goldberg v. Kelly, 397 U.S. 254 (1969); Willner v. Comm. on Character & Fitness, 373 U.S. 96 (1963); In re Ming, 469 F.2d 1352 (7th Cir. 1972); United States v. Hicks, 37 F.2d 289 (9th Cir. 1930).

That petitioner received a hearing in the Florida proceedings is no justification for the peremptory manner in

which the Missouri Supreme Court disposed of his career. First, the Missouri court itself has declared that Missouri will make "its own independent judgment" as to the effect to be given a sister state's adjudication of disbarment or discipline after "fully inform[ing itself] of the nature of the misconduct and all the attendant circumstances" by considering "all available sources which can properly be utilized," including all evidence properly offered in the forum state's proceeding and the record of the sister state proceedings, and that it "may accordingly order discipline which is more or less stringent than that awarded by the sister state." In re Weiner, 530 S.W.2d 222, 224-25 (1977), quoting in part Florida Bar v. Wilkes, 179 So.2d 193, 197 (Fla. 1965). Furthermore, like other states, Missouri has recognized

that the lawyer's rehabilitation or reformation may affect its disciplinary determinations:

> "'It is and should be the policy of the law to forgive one his errors long since past, and not to allow the same to be resurrected, where there is nothing to show but that for several years after such wrongdoing the party may have lived an exemplary life.'" In re Williams, 128 S.W.2d 1098, 1107 (1939), quoting In re A. Sherin, 27 S.D. 232, 130 N.W. 761, 762 (1916).

Petitioner claimed before the Missouri Supreme Court that the misconduct found in Florida occurred more than ten years previously, when he was a recent law school graduate, and that it was the only blemish on his record, and that he was currently of good moral character and fitness to continue to practice law in Missouri. In disbarring him without affording him a hearing at which he could have tried to prove his claim of mitigat-

ing circumstances and that he had been rehabilitated and was currently fit to practice--claims which, if valid, had material bearing under state law on the issue of whether petitioner should be disbarred--the Missouri court deprived petitioner of procedural due process of law. See In re Ming, 469 F.2d at 1356 (suspension ordered without hearing on basis of misdemeanor criminal conviction because not "every Tom, Dick and Harry of a misdemeanor would serve as a basis for suspension" and because "[e]xtenuating circumstances tending toward a minimization of the penalty very probably would require a hearing for proper development").

Second, that petitioner received a hearing in Florida does not justify the Missouri court's summary disbarment because it failed to give him the oppor-

tunity to prove his claim that the Florida proceedings suffered a fatal constitutional defect in that the admission of huge amounts of hearsay evidence deprived him of his due process rights to confrontation and cross-examination. This court has held that a disbarment in one jurisdiction may not be given conclusive effect in another jurisdiction if in the first proceeding the attorney was deprived of the procedural due process requirements of fair notice of the charge. In re Ruffalo, 390 U.S. 544. The Court there declared, "One of the conditions this Court considers in determining whether disbarment by a State should be followed by disbarment here is whether 'the state procedure from want of notice or opportunity to be heard was wanting in due process.'" 390 U.S. at 550, quoting

Selling v. Radford, 243 U.S. 46, 51 (1911).

Petitioner pointed out to the Missouri court that the Florida Supreme Court had held in his case that due process of law does not require personal confrontation of witnesses in disciplinary proceedings, and he pointed to case law indicating that the rights to confront and cross-examine the witnesses against him--rights which are essential to the adversarial search for truth and thus the integrity of the fact-finding process--are in fact a due process requisite in such proceedings. See, e.g., Goldberg v. Kelly, 397 U.S. at 269; Willner v. Comm. on Character & Fitness, 373 U.S. at 102-04, 108 (majority and concurring opinions); In re Ming, 469 F.2d at 1355-56; United States v. Hicks, 37 F.2d 289, 292-93. Yet the Missouri

court disbarred him without affording him any opportunity to show the Florida proceedings were constitutionally deficient; indeed, there is nothing to indicate that the court below had anything before it but the Florida court's bare opinion. Sister-state findings of fact may constitutionally be given conclusive weight only if they are fairly determined, and in failing to afford petitioner an opportunity to show that the Florida findings were unfairly reached, the Missouri court itself violated his right to due process of law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the Missouri Supreme Court.

Respectfully submitted,

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December 11, 1987

APPENDIX

APPENDIX

SUPREME COURT OF MISSOURI

en banc

September 15, 1987

In Re:	)	
	)	
MERRELL G. VANNIER,	)	No. 69552
	)	
Respondent.	)	

ORDER

The Court having been informed by Information filed by the General Chairman, Missouri Bar Administration Advisory Committee, that Merrell G. Vannier was disciplined and disbarred by the Supreme Court of Florida on November 26, 1986, and,

The said Merrell G. Vannier having failed to show just cause why the adjudication of the Supreme Court of Florida should not be conclusive of the

misconduct found by that Court for the purpose of discipline by this Court,

It is ordered that Merrell G. Vannier be and he is hereby disbarred, that his right and license to practice law in this State is canceled and terminated and that his name is stricken from the roll of attorneys in this State.